

REMARKS

Claims 1, 2, 8, 17 and 18 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Lachman *et. al.* in combination with the article, “Encyclopedia of Pharmaceutical Technology,” U.S. 5,955,102 and U.S. 5,817323.

In considering the declarations presented in Applicant’s response filed August 18, 2010 to the Final Office Action mailed February 19, 2010, the Examiner asserts that the Declaration of Cooperman of June 6, 2007 (the “Cooperman Declaration”) is directed to commercial concentrated formulations of EPA and DHA and not directed to any flavors. Examiner asserts that these formulations are not described in the record and, therefore, it is unclear whether the formulations set forth in the Cooperman Declaration are the same ones claimed in the above-identified application. *See*, Advisory Action, point 3.

Further, the Examiner concludes that the commercial success of Nordic Naturals’ fish oils encapsulated in flavored gelatin capsules is not attributable to the content of the capsules because the unflavored liquid products also produced lower sales figures, as shown in the Opheim Declaration of September 25, 2006. *See*, Advisory Action, point 5. Moreover, the Examiner asserts that it is unclear whether the flavored gelatin capsules referred to in the Opheim Declaration of September 25, 2006 are the claimed gelatin capsules of the instant application.

Applicant respectfully submits that the formulations described in the Cooperman Declaration are the same formulations claimed in the above identified application. As noted in the Opheim Declaration of January 16, 2009, and noted by the Examiner in the Advisory Action, the formulations of the Cooperman Declaration are commensurate in scope with the claims of the above-identified application. Specifically, the Opheim Declaration of January 16, 2009 notes that the products described in the Cooperman Declaration are “formulations of highly concentrated fish oil encapsulated in capsules that contain gelatin, capsule softener present in an amount of approximately 32%, water present in an amount of approximately 8%, and a water soluble flavoring (a lemon flavoring) present in an amount of approximately 1.5%.” *See* Opheim Declaration of January 16, 2009, paragraph 3. As amended, claim 1 of the instant application recites:

A flavored capsule encapsulating a dose of fish oil, comprising: a) a forming agent chosen from the group consisting of gelatin and vegetable starch; b) a capsule softener; c) water; d) a water soluble flavoring; and e) a dose of fish oil, wherein said capsule softener is present in the range of about 10% to about 35%, the water is present in the range of about 6% to about 10%, the water soluble flavoring is present in a concentration of about 1.5%, and the water soluble flavoring is a lemon flavor.

As such, the formulations described in the Cooperman Declaration are within the scope of the formulations claimed.

Applicant also respectfully disagrees with the Examiner's assertion that the low sales figures of Nordic Naturals' non-flavored liquids indicate that the commercial success of Nordic Naturals' fish oils encapsulated in flavored gelatin capsules is not attributable to the claimed flavored capsules. As shown in the Opheim Declaration of September 25, 2006, Nordic Naturals' products comprising the claimed flavored gelatin capsules outsold products that do not comprise the flavored gelatin capsules, including non-flavored liquids. Therefore, these data suggest that the commercial success of Nordic Naturals' fish oils encapsulated in flavored gelatin capsules is attributable to the claimed flavored gelatin capsules. Indeed, the fact that non-flavored fish oils, which do not comprise the claimed flavored gelatin capsules, were not as commercially successful as the fish oils encapsulated in flavored gelatin capsules supports this assertion.

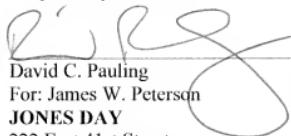
Further, Applicant respectfully submits that the flavored gelatin capsules mentioned in the Opheim Declaration of September 25, 2006 are the claimed gelatin capsules of the instant application. Specifically, the Opheim Declaration of January 16, 2009 notes that the flavored gelatin capsules for which sales figure were provided in the Opheim Declaration of September 25, 2006 contain "gelatin, capsule softener present in an amount of approximately 30-32%, water present in an amount of approximately 8%, and a water soluble flavoring (typically a lemon flavoring) present in an amount of approximately 1.5%. *See* Opheim Declaration of January 16, 2009, paragraph 2. Accordingly, the flavored gelatin capsules referred to in the Opheim Declaration of September 25, 2006 are within the scope of the instant claims.

CONCLUSION

Applicant respectfully submits the aforementioned remarks for consideration by the Examiner and entry into the file of the above-referenced application. Further, Applicant respectfully requests that the aforementioned Declarations be considered in light of these remarks in the continued examination of the above-referenced application.

Respectfully submitted,

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